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Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Comments received from Member States and international organizations

Addendum

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II. Comments received from Member States and international organizations

A. Member States

2. China

[Original: Chinese]

[26 April 2006]

MC/DTL Administrative letter No.26[2006]

Comments in response to the relevant draft documents of Working Group II of the United Nations Commission on International Trade Law

The three draft documents prepared by Working Group II (Arbitration and Conciliation) and as forwarded by UNCITRAL have been duly received. After consideration, we hereby submit the following comments:

I. Revised Legislative Provisions on Interim Measures and Preliminary Orders

(I) General comments on the text as a whole

The present draft represents an extensive expansion of the provisions in Article 17 of the 1985 UNCITRAL Model Law on International Commercial Arbitration regarding the power of the arbitral tribunal to order interim measures. The terms "interim measures" and "preliminary orders" are similar in meaning to "preservative measures" known in China's legal system, which include preservative measures towards property and preservative measures with regard to evidence. The Arbitration Law of China states in its Article 28 that "... If one of the parties applies for property preservation, the arbitration commission shall submit to a people's court the application of the party in accordance with the relevant provisions of the Civil Procedure Law"; and in its Article 46 that "... If the parties apply for such preservation, the arbitration commission shall submit the application to the basic-level people's court of the place where the evidence is located." In other words, the Chinese law has not accorded the arbitral tribunal the power to order preservative measures, nor the power to order interim measures or issue preliminary orders. In this connection, therefore, the present draft is in conflict with the relevant provisions of the Chinese civil procedure law and the arbitration law. There is no legal basis for courts in China to recognize and enforce interim measures and preliminary orders from foreign arbitral tribunals.

(II) Comments on specific provisions

Within the extent of our general views as above, we make the following suggestions for amendment of specific provisions:

1. For paragraph (1)(b), Article 17 bis—Conditions for granting interim measures in Annex I, Revised legislative provisions on interim measures and preliminary orders, it is suggested that subparagraph (b) "There is a reasonable possibility that the requesting party will succeed on the merits of the claim, ..." be deleted in its entirety, as it is no easy task to make an accurate prejudgement on the likelihood of success of the claim at the time of application for interim measures. Besides, who is going to determine such likelihood and how should it be determined remains a tough issue. It takes time to make such determinations. And interim measures are of such an urgent nature that does not allow for longer periods of time to decide on the possible existence of the likelihood of success. Delay in time will defeat the purpose of the provisions on interim measures.

2. For paragraph (5), Article 17 quater—Specific regime for preliminary orders, it is suggested that the clause "but shall not be subject to enforcement by a court" be deleted from the paragraph "A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court ..." for a preliminary order that is not subject to enforcement by a court will bring about no real effect.

3. For the second line in Article 17 quinquies—Modification, suspension, termination, it is suggested to insert the words "if it is justified" after "upon application of any party", since it is unacceptable for an application not to be justified.

4. For paragraph (1), Article 17 novies—Recognition and enforcement, it is suggested to delete the phrase "unless otherwise provided by the arbitral tribunal", since there should be no provision otherwise by the arbitral tribunal once it has issued an order for "interim measures". The phrase lends little room for reasonable understanding.

II. Revised legislative provisions on the form of arbitration agreement

(I) General comments on the text as a whole

The text is an attempt, in the light of technological developments, for revision by way of expanded understanding of the requirement for " writing" in Article 7 of the Model Law regarding the definition and form of an arbitration agreement. The Arbitration Law in effect in China contains similar requirements for arbitration agreements to be "in writing". With technological advancement, inter-personal communications and the conclusion of contracts are being done increasingly by verified means, which undoubtedly calls for a corresponding expansion in the interpretation of the requirement for "writing", hence the necessity to revise Article 7 of the Model Law. For this purpose, we prefer the first alternative text which describes in specific terms the forms of "writing" and lends itself to easier operation, while being consistent with the understanding of written forms of contracts in China's current practice.

(II) Comments on specific provisions

1. For paragraph (3), Article 7—Definition and form of arbitration agreement under (1) Revised draft article 7 in Annex II, Revised legislative provisions on the form of arbitration agreement, it is suggested to substitute in the second line the word "established" for the word "recorded", the reason being that "recorded" is narrower in its meaning than the word "established".

2. For Article 7— Definition of arbitration agreement under (2) Alternative proposal, the text is less than satisfactory and therefore is to be discarded.

III. Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

The draft declaration is intended to express the desire that States would give at an earlier date their valid interpretation of the form requirements for arbitration agreements so as to keep pace with the development in the forms of writing in the modern society. The ultimate goal is to lead to recognition and enforcement of international commercial arbitration awards in various States to the greatest possible extent. The declaration is in correspondence with the revision and improvement of Article 7 of the Model Law. We find the current text of the declaration to be appropriate and, therefore, fully acceptable.

IV. Expressions in the Chinese and English texts

With regard to individual cases of inconsistency in the expressions between the Chinese and the English texts, we propose to delay our examination and finalization until after the meetings later this year or next year when the English texts are finalized.